UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/650
20 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 650

Case No. 703: BAKR ET AL

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 17 June 1992, Daoud Nehar Bakr, Mohammad Nayef Abbas, Eilan Mahmoud Mi'ari, Khaled Ahmad Yasin, Hassan Abdulla Al Sha'bi and Mahmoud Mohammed Said Tamim, former staff members of the United Nations Relief and Works Agency for Palestine Refugees, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 10 October 1992, the Applicants, after making the necessary corrections, again filed an application requesting the Tribunal to order, inter alia:

"(a) [The production of certain documents].

...

(b) Rescinding the Respondent's decisions not to reinstate Applicants, or to compensate them for their services (...).

(c) Reinstating the Applicants to service, and considering them on special leave with pay since they applied for reinstatement i.e. 1.9.1988, and repayment of their Provident Fund benefits under the UN operational rate available at the time.

(d) Compensating the Applicants for the injury, hardship, and loss sustained with the following:

BAKR : US$ 55,000,	ABBAS : US$ 45,000
MI'ARI : US$ 45,000,	YASIN : US$ 50,000
SHA'BI : US$ 45,000,	TAMIM : US$ 40,000"

Whereas the Respondent filed his answer on 29 March 1993;

Whereas the Applicants filed written observations on 25 April 1993;

Whereas, on 9 March 1994, the President of the Tribunal requested the Respondent to produce an answer on the merits, which he did on 20 April 1994;

Whereas, on 9 and 16 May 1994, the Applicant submitted additional statements;

Whereas the facts in the case are as follows:

The Applicant Daoud Nehar Bakr entered the service of UNRWA on 9 February 1955, as a Primary School Teacher, at the Kastal Boys School, in Homs Town, Syrian Arab Republic, on a contract of "indefinite duration" as an area staff member. He served thereafter until 30 September 1986, when he resigned from the Agency with effect from 1 November 1986. The Applicant was then paid the termination benefits to which he was entitled, including his Provident Fund benefits.

Mohammad Nayef Abbas entered the service of UNRWA on 1 April 1965, on a temporary indefinite appointment at the grade 6, step 1 level, as an area staff member, as an Elementary School Teacher at the Shajara School, North Area Homs, Syrian Arab Republic. He served thereafter, always as a Teacher, until 7 February 1987, when he resigned from the Agency, having reached the position of Senior

Teacher. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

Eilan Mahmoud Mi'ari entered the service of UNRWA on 16 October 1963, on a temporary indefinite appointment at the grade 5, step 1 level, as an area staff member, as a Teacher at the Beisan School, Hama, North Area, Homs, Syrian Arab Republic. She served thereafter until 17 February 1987, when she resigned from the Agency, having reached the position of Teacher B. The Applicant was then paid the separation benefits to which she was entitled, including her Provident Fund benefits.

Khalad Ahmad Yasin entered the service of UNRWA on 21 October 1959, on a temporary indefinite appointment, at the grade 5, step 1 level, as an area staff member, as a Teacher V at the Samkh Boys School, Hama, Syrian Arab Republic. He served thereafter until 15 February 1987, when he resigned from the Agency, with the functional title of Teacher C. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

Hassan Abdulla Al Sha'bi entered the service of UNRWA on 3 October 1964, on a temporary indefinite appointment at the grade 6, step 1 level, as an area staff member, as a Teacher D at the Khariyeh School in Lattakia, North Area, Syrian Arab Republic. He served thereafter until 7 February 1987, when he resigned from the Agency, with the functional title of Teacher A. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

Mahmoud Mohammed Said Tamim entered the service of UNRWA on 19 October 1966, on a temporary indefinite appointment at the grade 6, step 1 level, as an area staff member, as a Certified Preparatory Teacher at the Al Jora Boys School at Sanaber, South Area, Syrian Arab Republic. He served thereafter until 7 February

1987, when he resigned from the Agency, with the functional title of Senior Teacher. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

On 19 September 1988, the Applicants Abbas, Yasin, Sha'bi and Tamim wrote to the Field Director in the Syrian Arab Republic, claiming the right to be re-employed as teachers with priority over other candidates. In a reply dated 11 October 1988, the Acting Field Administration Officer advised the Applicants that the Agency's rules governing re-employment had changed in 1985 and that the new Agency policy was to recruit the best qualified teachers.

On 29 May 1989, the Applicant Mi'ari wrote to the Field Administration in the Syrian Arab Republic, enquiring about the possibilities of employment with the Agency. In a reply dated 1 June 1989, the Officer-in-Charge at the Syria Field Office informed the Applicant that her request for re-employment could not be entertained in light of rules relating to qualifications and age because she was more than 35 years old.

In October 1989, the Applicants wrote to the Field director in the Syrian Arab Republic, asserting their rights to be re-employed as teachers with priority over other candidates. In a reply dated 1 November 1989, the Field Office Director informed the Applicants as follows:

> "Judging by your above referenced letter, it is quite clear and unquestionable that you are well informed of the content of paragraph 3.6 of Personnel Directive A/4 part VI which you implicitly refer to in your letter and which was valid till October 1985, when it was cancelled.
>
> This prior knowledge of the provisions of the said Personnel Directive, together with the fact that rules and regulations in the Agency as in any other establishment or organization are in no way unamendable or not liable to change, which you must undoubtedly have realized through your long service with this Agency, should logically have urged you to raise an earnest question as to whether or not the

said provision was still valid before you tendered your resignations; particularly so, because you had pinned your hopes for re-employment with the Agency on that provision."

On 5 August 1991, the Applicants asked to be paid termination indemnities. The Administration rejected this request on 5 September 1991, on the ground that "the Agency Rules do not provide for payment of any Termination Indemnity to any staff member who resigns his job at his own will before reaching the age of early voluntary retirement."

After a further exchange of correspondence between the respective Applicants and the Respondent, on 12 December 1991, the Applicants lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its reports, on 23 April 1992. Its findings and recommendation in cases Bakr, Abbas, Yasin, Sha'bi and Tamim read as follows:

"11. Findings...

The Board examined the appeal, the Administration's reply and the Applicant[s]' observations on it. The Board focused on the content of paragraph 3.6 of Personnel Directive A/4/Rev.4/Amend.9 effective 1 July 1980, titled 'Reinstatement of Teachers' and [finds] that it does not invoke [a] contractual relation between the Agency and the Applicant in any sense.

12. The Board ... also [finds] that only 'a staff member' can file an appeal against a disciplinary measure or on anything that touches on the terms of his/her appointment.

13. In this context, the Board finds that the Applicant's case does not qualify to invoke the competence of the Board as the matter raised is outside its jurisdiction and at the material time, the Applicant did not have the status of a staff member of the Agency.

RECOMMENDATION

14. In view of the foregoing, the Board submits that it lacks jurisdiction to entertain such an appeal and therefore, without prejudice to any other submission as may become necessary, makes its recommendation to declare this appeal case unreceivable."

Its findings and recommendation in the Mi'ari case read as follows:

> "10. The Board examined the appeal, the Administration's reply and the Applicant's observations on it. The Board focused on the content of paragraph 3.6 of Personnel Directive A/4/Rev.4/Amend.9, effective 1 July 1980, titled'Reinstatement of Teachers' and [finds] that it does not invoke [a] contractual relation between the Agency and the Applicant in any sense; and on the provisions of Area Staff Rules 109.6 and 109.9 and [found] that the Applicant could not be indemnified for her services with the Agency.
>
> 11. The Board has also considered appeal procedures as stipulated in Staff Rule 111.3 which sets forth that only 'a staff member' can file an appeal against a disciplinary measure or on anything that touches on the terms of his/her appointment.
>
> 13[sic]. In this context, the Board finds that the Applicant's case does not qualify to invoke the competence of the Board as the matter raised is outside its jurisdiction and at the material time, the Applicant did not have the status of a staff member of the Agency.
>
> RECOMMENDATION
>
> 14. In view of the foregoing, the Board submits that it lacks jurisdiction to entertain such an appeal and therefore without prejudice to any other submission as may become necessary, makes its recommendation to declare this appeal case unreceivable."

On 13 May 1993, the Officer-in-Charge, Headquarters, UNRWA, transmitted to the Applicants copies of the JAB's reports and informed them as follows:

> "...the Board has concluded that it has no jurisdiction to consider your application, which was held to be not receivable.
>
> I accept this conclusion and your application therefore stands dismissed."

On 10 October 1992, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Area Staff Rules can only be amended without prejudice to the acquired rights of staff members.

2. Staff members, including the Applicants, were not properly notified of changes to the Personnel Directive A/5/77.

Whereas the Respondent's principal contentions are:

1. The Area Staff Regulations and Rules governing the Applicants' appointment when they resigned from service and/or applied for re-employment did not assign jurisdiction to the United Nations Administrative Tribunal, which is therefore without competence ratione materiae to entertain the present application.

2. The United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991.

3. The Applicants have no standing to bring their claim.

4. The Applicants' claims against the Respondent are time-barred.

5. There is no evidence that the Respondent's decision was in any way improper.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. As all the Applicants' claims are related and have been submitted jointly, the Tribunal decides that they should be joined and dealt with in one judgement.

II. The Respondent's first legal argument is that the Area Staff Regulations and Rules governing the Applicants'appointments when they resigned from service and/or applied for re-employment did not assign jurisdiction to the United Nations Administrative Tribunal which is, therefore, without competence ratione materiae to entertain the present application.

This argument is based on the fact that the Applicants were area staff members and therefore subject to the Area Staff Regulations and Rules. These regulations and rules were amended on 14 June 1991, to give staff members a broader range of remedies in respect of administrative disciplinary decisions taken by the Agency. As the Applicants' resignations from the service and their subsequent applications for re-employment took place prior to 14 June 1991, they come under the scope of the rules and regulations that obtained prior to 14 June 1991.

III. The Applicants each appealed to the Joint Appeals Board (JAB) which found the appeals to be unreceivable. The Commissioner-General accepted the Board's conclusions.

In his legal argument, the Respondent describes UNRWA as a subsidiary organ of the General Assembly established under resolution 302(iv) of 8 December 1949, to deal with a specific emergency situation. The Agency is of a temporary nature and the General Assembly has, in recognition of this, granted the Director, now the Commissioner-General of UNRWA, broad powers to deal with all aspects of its work, including the recruitment and management of staff. Thus, under paragraph 9(b) of General Assembly resolution 302(iv), the Commissioner-General was authorized to select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, and in accordance with the Staff Regulations and Rules of the United Nations as the Commissioner-General and the Secretary-General would agree should be applicable.

IV. For operational and historical reasons, UNRWA's approximately 19,000 staff have been divided into two entirely separate categories, with separate conditions of service. A very limited number (about 175) belong to the category of "international staff" and are governed by the set of staff regulations and rules known as the International Staff Regulations and Rules which are virtually identical to the 100 Series of the United Nations Staff Regulations

and Rules. This category of staff has always had access to the Administrative Tribunal. The rest of the UNRWA staff, comprising the majority, are governed by the Area Staff Regulations and Rules which were amended on 14 June 1991.

V. The main innovations brought about by these amendments were that area staff members could from then on (a) appeal against any administrative decision alleging non-observance of their terms of appointment and against any type of disciplinary action, and (b) appeal to the United Nations Administrative Tribunal.

VI. The Respondent contends that the Applicants, as area staff members, were governed at the time they submitted their resignations and/or applied for re-employment, by the special set of Area Staff Regulations and Rules referred to in paragraphs III and IV above. These regulations and rules, which provided for recourse procedures against an administrative decision to terminate services or disciplinary action under Regulation 10.3, were the only ones that governed the Applicants' appointments, and they made no reference to the United Nations Administrative Tribunal. As recognized by the Tribunal in Judgement No. 70, Radicopoulos vs. UNRWA, the right to make applications to the Tribunal can be denied in certain cases. The Respondent's submission is that, therefore, the United Nations Administrative Tribunal has no competence ratione materiae to review the substance of the decisions taken before 14 June 1991, not to re-employ the Applicants.

VII. The Respondent further contends that the United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA staff members when the cause of action arose before 14 June 1991; that the amendments of 14 June 1991 should be construed as having a prospective effect; that the recourse procedures provided therein can only be invoked when the cause of action arose on or after that date; that the decisions not to re-employ cannot, therefore, be appealed to the Administrative

Tribunal. The Respondent also refers to important policy reasons for ensuring that all administrative decisions taken by the Agency before 14 June 1991 should not automatically be open to review by the Administrative Tribunal. There would, he argues, be serious administrative consequences in allowing some 19,000 area staff members to question administrative decisions taken as far back as forty years.

VIII. The Tribunal, in dealing with the Respondent's contention that it is without competence to entertain the applications, must take cognizance of its own previous approach in this area and, indeed, to the most recent case in which it dealt with this question, Judgement No. 628, Shkukani vs. UNRWA (1993).

The Tribunal considers the Respondent's reference to Radicopoulos to be selective. In that case, while indicating that no mandatory provisions instituting another procedure had been laid down at the relevant time, the Tribunal considered itself competent to deal with the application on the basis of the agreement pursuant to General Assembly resolution 302(iv) referred to in paragraph III above. In the earlier 1955 case of Hilpern (Judgement No. 57), the Tribunal also rejected the Respondent's contention that "the Tribunal is competent to hear applications from staff members of the United Nations Secretariat only." The Tribunal refers to these early cases merely to indicate that it was of the view that it was not precluded from hearing cases involving staff members such as the Applicants, there being no other judicial forum for dealing with such cases.

In the more recent case of Zafari (Cf. Judgement No. 461, (1989)) the Tribunal made reference to the following advisory opinion of the International Court of Justice of 13 July 1954: "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of

any disputes which may arise between it and them" (Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion on 15 July 1954, I.C.J., Reports 1954, p. 57).

IX. The Tribunal restated this view as recently as last year in the Shkukani case, that it is competent to entertain cases, such as this one, where the primary concern is the absence of any judicial procedure established by the Area Staff Regulations and Rules for the settlement of disputes submitted to the JAB. Indeed, the Tribunal is surprised, in view of the clear and unequivocal finding in the Shkukani case, that the Respondent seeks, yet again, to make this argument.

X. Any body to which these Applicants had recourse under the Area Staff Regulations and Rules was an internal body. The Applicants should have had available to them, in fairness and equity, an external judicial body to which they could have appealed. The international staff members of UNRWA had such recourse but not the area staff members. There can be no justification for this.

XI. The Tribunal, therefore, rejects the Respondent's argument that the Tribunal is without competence ratione materia and ratione temporis to receive the application.

XII. Nor can the Tribunal accept the Respondent's arguments which are based on reasons of policy and practical difficulties. To do so, would be to hold that equity and justice should take second place to mere practicalities and administrative difficulties.

XIII. The Respondent also argues that the Applicants have no standing to bring their claim, as they have not alleged the non-observance of their employment contracts and as they were not staff members. The Respondent refers to the JAB's determination that it did not have competence to entertain the Applicants' appeal on the grounds that their claims "did not invoke a contractual relation

between the Agency and the Applicants" and that they were not staff members as defined by the Staff Rules at the time the alleged claims arose.

The Respondent cites article 2 of the Statute of the Tribunal, which he says, limits the Tribunal's competence to applications alleging non-observance of contracts of employment of staff members, including all pertinent regulations and rules in force at the time of the alleged non-observance. Therefore, according to the Respondent, standing to bring an application to the Tribunal depends on the non-observance of an employment contract by the Agency in relation to a staff member. In the absence of such a contract, and allegations of its non-observance, the Applicants have no standing to bring the action and the Tribunal is not competent to receive the application. The Respondent submits that the Applicants fail on both grounds.

XIV. While it clearly is the case that the Applicants were not staff members following their resignation, can one say validly that this cuts them off from recourse to the appeal procedures? Does it mean that the Tribunal is not competent to hear their appeals?

In the Tribunal's view, the fact that the Applicants were not staff members does not necessarily deprive them of recourse. These, of course, are former staff members who filed appeals relating to alleged non-observance of the terms of their contracts of employment.

XV. This brings the Tribunal to a consideration of the status of staff circular A/5/77 of 29 June 1977. Paragraph 10(c) states:

> "The Agency has agreed to amend the relevant Personnel Directive to provide that if a teacher resigns from the Agency to accept another teaching post within the Middle East and he subsequently applies for re-employment by re-instatement within two years from [the] date of resignation, the Agency will give him priority over new candidates who are equally qualified."

On 1 July 1980, the Administration issued Personnel Directive A/4 Rev.4/Amend.9. Paragraph 3.6 of this Directive states:

> "Re-employment of Teachers
> Teachers who have resigned from the Agency's service to accept other teaching posts within the Middle East, and who apply for re-employment by reinstatement within three years from the date of their resignation, will be given priority over new candidates who are equally qualified."

The Applicants resigned and subsequently applied for re-employment within the newly designated period of three years. They were not given priority on the grounds that the rules governing re-employment changed in 1985. The Applicants knew nothing of this change, but the Agency's attitude was that such ignorance can only be considered to have been culpable. The Agency's position was that their applications for employment would be considered on their merits with those of the other candidates.

In a letter dated 15 January 1989, the Deputy Director UNRWA Affairs, Syrian Arab Republic, noted that the Personnel Directive still contained the reference to "priority". However, he said that "that reference was cancelled in June 1983, at a Cabinet Meeting although the change may not have been made clear to all those who are now concerned with such problems". He also said that the existing position was that the appointment of staff should be strictly on the basis of merit and that the Personnel Directive was being revised.

XVI. It is clear that no reasonable effort was made by the Agency to inform its staff of this fundamental change. The Applicants resigned while under a misapprehension concerning the true position regarding priority in re-employment and this, through no fault of their own. It is the Tribunal's view, therefore, that this matter must be approached on the basis that the Personnel Directive, as amended in 1980, was still in force at the time of the resignations and subsequent applications for re-employment.

XVII. But what is the effect of the Personnel Directive? If one were to accept the Respondent's argument that the Directive was not a term of the Applicant's contract of employment, the Directive has no effect. Is it rational to seek to look upon this provision as being without enforceability and without purpose, simply because it was not written into the Applicant's contract? Surely not. Does it not seem illogical that the Applicants should have no right of redress if the Agency seeks to ignore this particular provision of the Personnel Directive? What is the purpose in having such a Directive at all if this were to be the case? It appears to the Tribunal to be only fair and just that the Personnel Directive carries within it the inference that if it were to be ignored, the Applicants would have a right of redress. On that basis, the Tribunal does not consider it an exaggeration to say that it is akin to being a term of the contract of employment and that it should be inferred to be a term of the contract of employment.

The Tribunal therefore rejects this argument.

XVIII. The Respondent then argues that the Area Staff Regulations, at the time of the impugned decisions, did not provide for appeal other than against the termination of services. The Respondent chooses to bolster his argument by reference to the Shkukani case, but he tends to be selective in his view of it. While he quotes the Tribunal's finding in that case, that it had to be considered in the light of the rules as they were prior to the date of the amendment, he ignores the thrust of the case to the effect that if such rules were discriminatory, they could not be relied on. Why should the Applicants be in a disadvantaged position now, when compared with others who can rely on a broader range of appeals against administrative decisions, including applications from staff members alleging non-observance of their terms of appointment? It offends equity and justice that this should be so. If it had been the intention to perpetuate that position, the provisions extending the jurisdiction of the Tribunal should have provided expressly for this result.

XIX. Finally, the Respondent argues that the claims are barred by lapse of time. This argument is based on the proposition that the JAB did not exercise its discretion to waive the time limits and properly held the Applicants' appeal not receivable. This statement does not represent the true situation. The JAB found the case not to be receivable on other grounds and the Respondent did not make the case to the JAB that the appeal was time-barred. Having failed to do so before the JAB, the Respondent cannot do so now and cannot seek to rely on a finding that was not made on that basis. This argument is rejected.

XX. The Respondent says that the Applicants have impugned the Respondent's discretionary administrative decision not to re-employ them as teachers, that their only allegation is that they were not accorded a right to re-employment, rather than that there was error in the Respondent's actions. This is not the Applicants' case. Their claim is that they were not given priority.

XXI. In view of its findings on the various matters raised by both parties, the Tribunal is of the view that it would be unjust and inequitable if the Applicants were not to be given priority in future allocation of posts. It must be remembered, however, that even with such priority, they, or at least some of them, might not necessarily be re-appointed in the immediate future.

Therefore, the Tribunal orders:

(i) That the Applicants be accorded priority for the posts for which they apply and for which they are qualified; and

(ii) If any of the Applicants is not appointed within 9 months from the date of this judgement, the Respondent pay to such

Applicant compensation equivalent to 12 months of his or her net base salary at the rate in effect at the time of such Applicant's resignation.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN MILBURN
Executive Secretary